Office-Supreme Court, U.S.
FILED
FEB 14 1964
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 832

STEFANOS KTISTAKIS,
*Petitioner,*

*vs.*

UNITED CROSS NAVIGATION CORP. and CARRAS (U.S.A.) LTD.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
*Attorney for Petitioner,*
15 Park Row,
New York 38, N. Y.

JACOB RASSNER,
ALAN C. RASSNER,
*On the Petition.*

Adams Press Corp., 82 Beekman Street, N. Y.—Beekman 3-1050-51 110

## TABLE OF CONTENTS


PAGE

PETITION FOR WRIT OF CERTIORARI:

Opinions Below ..... 1

Jurisdiction ..... 2

Questions Presented ..... 2

Constitutional Provisions Involved ..... 3

Reasons for Granting the Writ ..... 3

Statement ..... 4

Argument ..... 4

Point I—Tort defenses are not available in ex contractu causes of action ..... 5

Point II—The judgment below violates the Fifth Amendment to the Federal Constitution, as it deprives petitioner of due process and denies him equal protection of the law ..... 9

Point III—A ship's officer does not assume the risk of injury due to unseaworthiness, nor is it negligence on the part of a ship's officer to fail to correct an unseaworthy condition unknown to him ..... 12

Conclusion ..... 13

APPENDIX:

A—Opinion ..... 15

B—Judgment ..... 18

PAGE

## Cases Cited

Aguilar v. Standard Oil Co., 318 U. S. 724, 63 S. Ct. 930 ..... 6

Becker v. Waterman S.S. Corporation, 179 F. 2d 713 10

Chicopee Mfg. Corp. v. Kendall Co., 288 F. 2d 719 .... 9

Dixon v. United States, decided by Judge Weinfeld, 120 F. Supp. 747, affirmed by the Court of Appeals, Second Circuit, opinion by Circuit Judge Harlan, 219 F. 2d 10 ..... 3, 10

Hildebrand v. United States, 134 F. Supp. 514, aff'd, 226 F. 2d 215 ..... 11

Horton v. Moore-McCormack Lines, Inc., —— F. 2d —— (decided Jan. 7, 1964, 2nd Cir.) ..... 6fn

Mitchell v. Trawler Racer, Inc., 80 S. Ct. 926, 362 U. S. 539 (1960), fn. 7, p. 930 ..... 10

New York Lubricating Oil Co. v. Pusey, 211 Fed. 622 12

Northwest Airlines v. Glenn L. Martin Company, 224 F. 2d 120 ..... 12

Phillips Petroleum Co. v. Miller, 84 F. 2d 148 ..... 11

Radio Position Finding Corp. v. Bendix Corp., 205 F. S. 850, aff'd, 371 U. S. 577 ..... 9

Ryan Stevedoring Co., Inc. v. Pan-Atlantic S. S. Corp., 350 U. S. 124, 76 S. Ct. 232 ..... 6

Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 59 S. Ct. 262 ..... 11

Southwestern Gas & Electric Co. v. Lain, 139 F. 2d 142 ..... 12

Stark v. American Dredging Co., 66 F. Supp. 296 .... 12

PAGE

Stokes v. United States, 144 F. 2d 82 ..... 11

The Arizona v. Anelich, 298 U. S. 110, 56 S. Ct. 707, fn. 2 ..... 6, 7

Yick Wo v. Hopkins, 118 U. S. 356 ..... 9

**United States Constitution Cited**

Fifth Amendment ..... 6, 9, 9fn

**Statutes Cited**

General Maritime Law ..... 4

28 U.S.C.:

Sec. 1254(1) ..... 2

46 U.S.C.A. (Jones Act):

Sec. 688 ..... 4

# Supreme Court of the United States

OCTOBER TERM, 1963

No.

STEFANOS KTISTAKIS,

*Petitioner,*

*vs.*

UNITED CROSS NAVIGATION CORP. and CARIAS (U.S.A.) LTD.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Stafanos Ktistakis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled action on November 18, 1963.

### Opinions Below

The first opinion rendered in this case, by the United States District Court for the Southern District of New York (BONSAL, J.), is reported at 204 F. Supp. 293, on April 13, 1962.

On appeal to the United States Court of Appeals for the Second Circuit the judgment aforementioned was affirmed in part by an order entered and dated May 7, 1963 (opinion reported at 316 F. 2d 869).

The second opinion of the United States District Court, on remand, was entered on June 17, 1963 by Boxsal, D. J. (not officially reported).

The case was again appealed to the United States Court of Appeals for the Second Circuit, resulting in the judgment which petitioner seeks to have reviewed by this Court. Opinion reported at 324 F. 2d 728.

## Jurisdiction

The judgment of the Court of Appeals was dated November, 1963 and was entered on November 18, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

## Questions Presented

1. Since unseaworthiness is traditionally classified as a breach of warranty, and therefore is *ex contractu*, is it not improper and erroneous to apply a tort concept, contributory negligence, to reduce damages caused by the breach of warranty?

2. Is it not improper and erroneous to apply the tort concept of assumption of risk to reduce damages for breach of warranty of seaworthiness, which cause of action is *ex contractu*?

3. Does failure to discover an unknown unseaworthy condition aboard ship constitute negligence on the part of the officer on watch?

4. Is a ship's officer's personal injury damage award subject to reduction if injured by reason of an unknown unseaworthy condition which he failed to discover and correct?

## Constitutional Provisions Involved

United States Constitution, Fifth Amendment:

"No person shall * * * be deprived of life, liberty, or property without due process of law; * * *".

## Reasons for Granting the Writ

1. The questions presented raise legal issues which affect the rights of all seamen and those performing their duties, ship's officers and any other maritime personnel who may be in a supervisory capacity. These issues have not previously been decided by this Court and are of sufficient importance and scope to warrant review.

2. There is a conflict between the holding of the Court below in the present case and the holding in the case of *Dixon* v. *United States*, decided by Judge WEINFELD, 120 F. Supp. 747, and affirmed by the Court of Appeals for the Second Circuit, opinion by Circuit Judge HARLAN, 219 F. 2d 10.

3. The decision by the Court below constitutes a radical departure and unwarranted curtailment of remedial rights, constituting a denial of equal protection before the law, as heretofore ships' officers were not charged with contributory negligence based on an unseaworthy condition proximately causing injury, notwithstanding the duty of said officer to inspect and correct said condition, as exemplified by the conflict in the instant case with the holdings in the cases cited under Point II, *infra*.

4. The Court below has decided an important question of federal law which has not been, but should be, settled by this Court.

## Statement

Jurisdiction below was based on the Jones Act, 46 U.S.C.A. §688, and the General Maritime Law, based on unseaworthiness.

The District Court, which tried this case without a jury, found that the petitioner was entitled to recover the sum of $80,000 in damages, but reduced the award by 50% for petitioner's contributory negligence for not discovering and correcting an unknown unseaworthy condition.

The appeals to the Circuit Court of Appeals were from that part of the judgment entered in the United States District Court for the Southern District of New York which constituted a reduction in the amount of damages to which the petitioner was adjudged entitled.

The pertinent facts may be briefly summarized as follows:

Petitioner was the second mate on board the S.S. GENIE, a vessel owned and operated by the respondent, United Cross Navigation Corp. On November 14 and 15, 1957, the S.S. GENIE was discharging oil at Port Socony, Staten Island, New York.

The petitioner, as second mate, stood his watch from midnight to 4:00 a.m., on November 15th and was the officer in charge at that time. At about 2:30 a.m., he was walking aft and as he passed under the discharge lines, which were approximately 4 to 5 feet above the deck, he stepped on an accumulation of oil mixed with sawdust and fell, landing on his lower back and sustaining the permanent and totally disabling injuries claimed.

## Argument

The Trial Court found that the mixture of sawdust and oil on the deck was created before the petitioner came on watch at midnight.

The Trial Court found such condition constituted unseaworthiness which was the proximate causation of petitioner's injury.

Implicit in this finding is the fact that the petitioner had nothing to do with causing or contributing to the creation of the unseaworthy condition which caused petitioner's fall.

The Trial Court made no finding that petitioner knew of the existence of the oil spill.

The found physical facts were the sole and proximate cause of petitioner's fall and would have caused his fall during a tour of inspection.

Assuming, *arguendo*, he was on a tour of inspection, he would have been caused to fall by the unseaworthy condition as he did when walking in the area, as his purpose in being there did not alter the physical facts of unseaworthiness; nor would it alter his method of crossing under the discharge lines or alter the proximate cause of the accident.

## POINT I

**Tort defenses are not available in ex contractu causes of action.**

Traditionally, the warranty of seaworthiness has always been treated as a warranty running from the vessel and/or the owner to the seamen hired to man her.

The essence of the contract of hire between the owner and the crew is that the owner warrants, on his part, that the vessel is seaworthy.

For a breach of the owner's warranty, the owner responds in damages.

Thus, traditionally, in essence and substance, the cause of action for breach of the warranty of seaworthiness is *ex contractu*.

Assumption of risk and contributory negligence are tort defenses which are not available as total or partial defenses to a cause of action action *ex contractu*.[1]

A close analogy supporting this contention is found in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 133-135; 76 S. Ct. 232, 237, 238, where it was held that contributory negligence was no defense to a cause of action for breach of warranty of good workmanship and the contract cause may not be changed to a tort cause because recovery may depend on a standard of performance.[1]

This Court's holding in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 730-731, 63 S. Ct. 930, 933-4 similarly presents a close analogy supporting petitioner's contention herein.

In *Aguilar*, this Court said, regarding maintenance and cure liability:

> "In the United States this obligation has been recognized consistently as an implied provision in contracts of marine employment. * * * Conceptions of contributory negligence, the fellow servant doctrine, and assumption of risk have no place in the liability or defense against it."

The warranty of seaworthiness, like the obligation to provide maintenance and cure, is an implied provision of the maritime contract of employment between ship-owner and crew.

As further support for the contention that the warranty of seaworthiness is a contractual obligation, see this Court's remarks in *The Arizona* v. *Anelich*, 298 U. S. 110,

---

[1] See *Horton* v. *Moore-McCormack Lines, Inc.*, ____ F. 2d ____ (decided Jan. 7, 1964, 2nd Cir.), where the Court referred to the area of "contractual indemnity" and held that one who breaches his agreement cannot argue the adversary is liable because of negligence.

121; 56 S. Ct. 707, 710-711 (including fn. 2). In *The Arizona*, this Court said:

> "In declaring in The Osceola, without qualification as to the assumption of risk, that the owner and vessel were liable to indemnify seamen for injuries caused by unseaworthiness of the vessel, * * *",

thus indicating, by use of the term "indemnify", that a contractual relationship was involved and not one merely predicated on tort alone.

This theory of contract between shipowner and crew is further carried out in footnote 2 on page 121 of 298 U. S. and page 710 of 56 S. Ct. wherein it is said:

> "The seaman's right of indemnity for injuries caused by defective appliances or unseaworthiness seems to have been a development from his privilege to abandon a vessel improperly fitted out. The privilege was recognized in Dixon v. The Cyrus, Fed. Cas. No. 3,930, 2 Pet. Adm. 407 (D. C. Pa., 1789), where it was held that the law will imply an engagement to the mariners that 'the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy.' This case was relied on in several early cases recognizing the seaman's right to consequential damages for injuries resulting from faulty equipment. Halverson v. Nisen, Fed. Cas. No. 5,970, 3 Sawy. 562; The Noddleburn (D. C.) 28 F. 855, 856; The Lizzie Frank (D. C.) 31 F. 477; and see The Wenonah, Fed. Cas. No 17,412. 1 Hask. 606. The rule that unseaworthiness releases the seaman from his contract is of uncertain origin, but it is closely related to the master's obligation to owner and shipper that the vessel be well equipped and ballasted. See Marine Ordinances of Louis XIV, Book II, art. VIII, Moloy, De

Jure Maritimo et Navali (7th Ed. 1722) p. 223. The seaman's right of indemnity was sustained in The City of Alexandria (D. C.) 17 F. 390; The Edith Godden (D. C.) 23 F. 43; Olson v. Flavel (D. C.) 34 F. 477; The A. Heaton (C. C.) 43 F. 592; The Frank and Willie (D. C.) 45 F. 494; The Julia Fowler (D. C.) 49 F. 277. A seaman was denied recovery for injuries in Couch v. Steele (1853) 3 El. & Bl. 402, on the ground that the owner owed to seamen no duty to make the vessel seaworthy. This case was disapproved in The Noddleburn, supra, 28 F. 855, 857, which allowed recovery for *an injury due to defective rigging. The Merchant Shipping Act of 1876, 39-40 Vict. ch. 80, § 5, provided that there should be imported into every contract of service between the owner of the vessel and the seamen on board an implied obligation "that the owner of the ship and the master, and every agent charged with the loading of the ship or the preparing thereof for sea or the sending thereof to sea shall use all reasonable means to insure the seaworthiness of the ship for the voyage at the time when the voyage commences and to keep her in a seaworthy condition for the voyage during the same." See Hedley v. Pinkney & Sons S.S. Co. [1894] A. C. 222, strictly construing this statute."* (Emphasis supplied.)

Clearly, the early maritime law (early insofar as this country is concerned) treated the warranty of seaworthiness as an implied contractual obligation between the shipowner and the mariners.

Nothing that has happened since in the field of maritime law has changed this basic and early approach.

It is respectfully submitted, therefore, that the Court below erred in permitting the defenses of assumption of risk and/or contributory negligence to reduce the award to petitioner.

## POINT II

**The judgment below violates the Fifth Amendment to the Federal Constitution, as it deprives petitioner of due process and denies him equal protection of the law.**

Petitioner is entitled to equal protection before the Court as was given to other ships' officers under similar circumstances.

The Fifth Amendment to the Federal Constitution prohibits the taking of property without due process.[1]

Due process requirements may be violated by Courts in judicial proceedings, as well as by other governmental agencies.

*Chicopee Mfg. Corp.* v. *Kendall Co.*, 288 F. 2d 719.

Due process under the Fifth Amendment includes protection against denial of the equal protection of the law as guaranteed by the Fourteenth Amendment.

*Radio Position Finding Corp. v. Bendix Corp.*, 205 F. S. 850, aff'd 371 U. S. 577.

Applying the law with an unequal hand is denial of the equal protection of the law.

*Yick Wo* v. *Hopkins*, 118 U. S. 356.

Then Judge HARLAN, before his appointment as a Justice of the United States Supreme Court and while sitting as an Appellate Judge in the Court of Appeals for the Second

---

[1] U. S. Constitution, Fifth Amendment:

"No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

Circuit, so clearly set forth the controlling law as to constitute the decision by the Court below a radical departure from well established and uniform law. This Court has relied on Justice HARLAN's learned exposition. See: *Dixon v. United States*, 219 F. 2d 10.

The United States Supreme Court in the case of *Mitchell v. Trawler Racer, Inc.*, 80 S. Ct. 926, 362 U. S. 539 (1960), under footnote 7 (page 930), stated:

> "* * * * See also the illuminating discussion in the opinion of then Circuit Judge Harlan in Dixon v. United *States*, 2 Cir., 219 F. 2d 10, 12-15."

In *Dixon v. United States, supra*, Dixon was injured when a rung gave way on a ladder which he used before making an inspection as to its safety. Dixon had actual knowledge of the fact that the ladder had been damaged and had undergone some repairs, and, in addition thereto, he had a direct order from his captain to inspect the very ladder in question. In *Dixon, supra*, the Court stated at page 16:

> "The lower Court held assumption of risk to be no defense because it found that Dixon had no reason to believe that the upper rungs of the ladder were in a dangerous condition, and also because as a matter of law the defense was invalid. We think both grounds were correct.
>
> Hence even though it was part of Dixon's duty to check the ladder and he had proceeded to the job with actual knowledge of the dangerous condition of the upper rungs, the shipowner could not have said that Dixon thereby assumed the risks involved."

In the case of *Becker v. Waterman S.S. Corporation*, 179 F. 2d 713, the officer was not held guilty of contributory

negligence when he slipped and fell as a result of a slippery condition as to which he had full actual knowledge, as he was in charge of the very operation in question.

In *Stokes* v. *United States*, 144 F. 2d 82, the Court of Appeals for the Second Circuit reversed the Trial Court which had found the chief engineer guilty of contributory negligence in failing to discover a defect in the flywheel, parts of which struck Stokes, holding that the failure in his duty to discover and correct a defect in the machinery did not constitute proximate causation of negligence.

In *Hildebrand* v. *United States*, 134 F. Supp. 514, aff'd 226 F. 2d 215, libellant, as third mate of the S.S. CASIMIR PULASKI, was not charged with contributory negligence in failing to repair a known defective ladder which broke while libellant was descending.

To charge a ship's officer with contributory negligence on the basis that he should have discovered the unseaworthy condition or had constructive notice of it, is tantamount to a charge that he assumed the risk of the dangerous condition, which defense has been specifically deleted from maritime law. *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 59 S. Ct. 262.

## POINT III

**A ship's officer does not assume the risk of injury due to unseaworthiness, nor is it negligence on the part of a ship's officer to fail to correct an unseaworthy condition unknown to him.**

In the case of *Phillips Petroleum Co.* v. *Miller*, 84 F. 2d 148, at page 153, the Court stated:

> "Nor, indeed, will knowledge be imputed as a matter of law, to one who fails to look for danger, which, under

the prevailing circumstances and conditions, he had no reason to apprehend or anticipate. The Ansonia v. Sullivan (C.C.A.), 239 F. 296; Borger v. Kane (D.C.), 8 F. (2d) 362, affirmed Kane v. Borgio (C.C.A.), 12 F. (2d) 1016."

See also:

*Stark* v. *American Dredging Co.*, 66 F. Supp. 296, 300;

*Southwestern Gas & Electric Co.* v. *Lain*, 139 F. 2d 142, 144.

Petitioner cannot be charged with the duty to anticipate the negligence of others who may have created the dangerous condition.

See: *New York Lubricating Oil Co.* v. *Pusey*, 211 Fed. 622, 626, where the court stated at pages 626 and 627:

"But it is necessary in this connection not to overlook the general rule that every person has a right to presume that every other person will perform his duty, and that, in the absence of reasonable ground to think otherwise, it is not negligence for one to assume that he is not exposed to danger which can come to him only from violation of the duty which the other vowed to him. Failure to anticipate the defendant's negligence does not amount to contributory negligence. (Citing cases.)"

The United States Court of Appeals for the Sixth Circuit in the case of *Northwest Airlines* v. *Glenn L. Martin Company*, 224 F. 2d 120 at page 127, discussed the question of whether a plaintiff becomes contributorily negligent by failing to anticipate the negligence of the defendant as follows:

"One need not anticipate the negligence of another until he becomes aware of such negligence. Baldridge v. Wright Gas Co., Inc., 1951, 154 Ohio St. 452, 96 N. E. 2d 300 (Syl. 1). It is not contributory negligence to fail to look out for danger when there is no reason to apprehend any. Standard Oil Co. v. Bruleson, 5 Cir. 1941, 117 F. 2d 412, 414; Phillips Petroleum Co. v. Hooper, 5 Cir., 1948, 164 F. 2d 743; S.S. Kresge v. Holland, 6 Cir., 1946, 158 F. 2d 495, 498."

## CONCLUSION

The legal significance of unseaworthiness constituting negligence is so beclouded as to result in some Courts granting recovery to ships' officers and other Courts denying recovery on identical facts.

In order to assure equal protection under the law, it is quite apparent that the conflict of opinion by the lower Courts requires resolution of the conflict by the Supreme Court of the United States.

It seems self apparent that the questions merit review, in light of the fact that some ships' officers have been absolved from the charge of contributory negligence when injured as a result of unseaworthy conditions of which they had actual knowledge, and in some instances, as in *Dixon, supra*, an actual order to correct the condition was involved, whereas in the case at bar, the petitioner, who knew nothing about the unseaworthy condition, was charged with contributory negligence and mitigation of damages to the extent of a 50% reduction, amounting to $40,000.

A ship's officer, particularly one who is crippled and totally disabled for life, should not be subjected to the fortuitous circumstance of being charged with contributory negligence where other officers, under similar circum-

stances, in the same and in other Courts, are not so charged.

The questions presented raise legal issues which involve important principles of maritime law that have not been settled by this Court or the Circuit Courts and which merit consideration by this Honorable Court to settle the law on the universally important questions of the availability of the tort defenses of assumption of risk and contributory negligence to an *ex contractu* cause of action, breach of warranty of seaworthiness.

Respectfully submitted,

JACOB RASSNER,
*Attorney for Petitioner.*

JACOB RASSNER and
ALAN C. RASSNER,
*On the Petition.*

# APPENDIX A

## Opinion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

---

No. 154—September Term, 1963.

(Argued November 7, 1963 Decided November 18, 1963.)

Docket No. 28410

---

STEFANOS KTISTAKIS,

Plaintiff-Appellant,

v.

UNITED CROSS NAVIGATION CORP. and CARRAS (U. S. A.) LTD.,

Defendants-Appellees.

---

*Before*:

WATERMAN, MOORE, and SMITH,
*Circuit Judges.*

---

Appeal by plaintiff below from judgment in his favor for $40,000, United States District Court for the Southern District of New York, Bonsal, J., after remand from Court of Appeals, 316 F. 2d 869. Affirmed.

*Appendix A*

JAMES CORINES (Jacob Rassner, of counsel) (Jacob Rassner, Alan C. Rassner, on the brief), New York City, for plaintiff-appellant.

ZOCK, PETRIE, SHENKMAN & REID (Edwin K. Reid, of counsel), New York City, for defendants-appellees.

---

PER CURIAM:

After trial of the action, which was brought within the district court's admiralty and maritime jurisdiction, the judge below, sitting without jury, awarded plaintiff damages of $40,000. He found plaintiff to have been so contributorily negligent that the $40,000 award represented but half of the recovery plaintiff would have been entitled to receive if he had not been negligent in any degree. This opinion is reported at 204 F. Supp. 293 (S. D. N. Y. 1962). Upon appeal, 316 F. 2d 869 (2 Cir. 1963), it was our view that the district judge may have given undue weight in his appraisement of plaintiff's negligence to the circumstance that plaintiff was the vessel's second mate, and, when injured, was the officer in charge of the watch, and hence had a duty to keep the deck clean from oil spill and sawdust. Therefore, we remanded the case to the district judge with instructions to re-examine the plaintiff's conduct "by the traditional negligence standard of whether he exercise the care which a reasonably prudent man would have exercised under the circumstances."

After remand plaintiff moved for summary judgment and a redetermination of the damages on the trial record. Obedient to our instructions, the judge reviewed the record and applied the standard we instructed him to apply. In a memorandum opinion he reaffirmed his previous estimate

of the extent to which plaintiff's own negligence had contributed to the injury, and he reaffirmed his former award of damages. Plaintiff appealed. We affirm. Oil had been dripping for several hours from the coupling where the shore discharge lines connected with the ship's manifold discharge lines and spill tubs had been placed under the leaking coupling to catch the drip. The entire area was well lighted. From midnight until 2:30 A.M. plaintiff had been responsible for the supervision of the work being done in this area, including the emptying of the spill tubs from time to time. The slippery condition caused by the oil that had dripped onto the deck from the coupling or the tubs should have been apparent to a reasonably prudent man in the plaintiff's position.

Affirmed.

# APPENDIX B

## Judgment

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

---

At a Stated Term of the United States Court of Appeals, held at the United States Courthouse in the City of New York, on the eighteenth day of November one thousand nine hundred and sixty-three.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
*Circuit Judges.*

---

STEFANOS KTISTAKIS,
Plaintiff-Appellant,

*v.*

UNITED CROSS NAVIGATION CORP., and CARRAS (U.S.A.) LTD.,
Defendants-Appellees.

---

Appeal from the United States District Court for the Southern District of New York.

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
APR 13 1964
JOHN F. DAVIS, CLERK

# Supreme Court of the United States

**OCTOBER TERM, 1963**

**No. 832**

STAFANOS KTISTAKIS,

*Petitioner,*

vs.

UNITED CROSS NAVIGATION CORP.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENT UNITED CROSS NAVIGATION CORP.

JOHN R. SHENEMAN
*Attorney for Respondent*
52 Broadway
New York 4, New York

EDWIN K. REID,
*Of Counsel.*

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| THE OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| QUESTIONS FOR REVIEW | 2 |
| STATEMENT | 2 |
| INITIAL DECISION OF THE DISTRICT COURT | 3 |
| INITIAL DECISION OF THE COURT OF APPEALS | 3 |
| DECISION OF THE DISTRICT COURT ON REMAND | 4 |
| SECOND DECISION OF THE COURT OF APPEALS | 5 |
| ARGUMENT | |
| 1. The record and opinions below do not present the questions posed by petitioner | 6 |
| 2. An action for unseaworthiness does not arise ex contractu | 7 |
| 3. It is well established in admiralty that contributory negligence is the doctrine of comparative negligence and that assumption of risk must be applied in harmony with it | 9 |
| 4. The rule of comparative negligence is a partial defense unlimited by the status of the claimant, his relationship to the party sued or the nature of the action | 11 |
| 5. The decisions below are clearly correct | 13 |
| 6. There is no conflict in the decisions | 14 |
| CONCLUSION | 17 |

## Table of Cases Cited

PAGE

*Ahlgren* vs. *Red Star Towing & Transp. Co., Inc.*, 214 F. 2d 618 (2 C.A. 1954) ..... 11

*Arizona, The* vs. *Anelich*, 298 U.S. 110 (1936) .. 9

*Baltimore Steamship Company* vs. *Phillips*, 274 U.S. 316 (1927) ..... 12

*Beadle* vs. *Spencer*, 298 U.S. 124 (1936) ..... 9

*Becker* vs. *Waterman S.S. Corporation*, 179 F. 2d 713 (2 C.A. 1950) ..... 14, 15

*Bentley* vs. *Albatross S.S. Co.*, 203 F. 270 (3 C.A. 1953) ..... 11

*California* vs. *Taylor*, 353 U.S. 553, n. 2 ..... 6

*Dixon* vs. *United States*, 219 F. 2d 10 (2 C.A. 1955) ..... 14

*Efstratios Karanikolas* vs. *Navegacion Maritime Pan.*, 157 F. Supp. 602 (S.D.N.Y. 1958) .. 11

*Hildebrand* vs. *United States*, 134 F. Supp. 514 (SDNY 1954), 226 F. 2d 215 (2 C.A. 1955) .. 15, 16

*Jacob* vs. *New York*, 315 U.S. 752 ..... 11

*McAllister* vs. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958) ..... 11

*McAllister* vs. *United States*, 348 U.S. 19 (1954) .. 7

*Mitchell* vs. *Trawler Racer Inc.*, 362 U.S. 539 (1963) ..... 8

*Pope & Talbot, Inc.* vs. *Hawn*, 346 U.S. 406 (1953) ..... 11

*Reed* vs. *Yaka*, 373 U.S. 448 (1963) ..... 8

PAGE

*John A. Roebling's Sons Co. of New York* vs. *Erickson*, 261 F. 986 (2 C.C.A. 1916) ..... 11

*Seas Shipping Company Inc.* vs. *Sieracki*, 328 U.S. 85 (1946) ..... 7, 8

*Socony-Vacuum Oil Co.* vs. *Smith*, 305 U.S. 424 (1939) ..... 9, 10, 12, 16

*Steamer Mux Morris, The* vs. *Curry*, 137 U.S. 1 .. 11

*Stokes* vs. *United States*, 144 F. 2d 82 (2 C.A. 1944) ..... 15

*Wood* vs. *U.S.*, 125 F. Supp. 42 (S.D.N.Y. 1954) .. 11

OTHER AUTHORITIES CITED

General Maritime Law of the United States ..... 2, 9

28 U.S.C. § 1254 (1) ..... 2

46 U.S.C.A. 688 ..... 2, 9, 11

# Supreme Court of the United States

**OCTOBER TERM, 1963**

**No. 832**

---

STAFANOS KTISTAKIS,

*Petitioner,*

vs.

UNITED CROSS NAVIGATION CORP.,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## BRIEF FOR RESPONDENT UNITED CROSS NAVIGATION CORP.

---

### The Opinions Below

The initial opinion of the District Court for the Southern District of New York is reported at 204 F. Supp. 293.

The opinion of the United States Court of Appeals for the Second Circuit affirming, reversing and remanding, in part is reported at 316 F. 2nd 869.

The opinion of the District Court on remand is not officially reported but is reprinted in Appendix A attached hereto.

The opinion of the Court of Appeals affirming the District Court's decision on remand is reported at 324 F. 2nd 728.

## Jurisdiction

The judgment of the Court of Appeals was entered on November 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## Questions for Review

Respondent objects to the Petitioner's analysis as to the four (4) questions involved herein in that the record and opinions below do not present the issues suggested by the Petitioner.

## Statement

In November, 1957, the Petitioner, a Greek citizen, was serving as second mate aboard the SS GENIE, a tank vessel owned and operated by Respondent, United Cross Navigation Corp., a Liberian corporation. During his watch he allegedly slipped on an oil spill, fell and was injured as he walked under the discharging lines as the Vessel pumped her cargo into the Socony Terminal at Staten Island, New York. It was stipulated that the Liberian law as to unseaworthiness was the same as the General Maritime Law of the United States and this was the basis of the jurisdiction below and not the Jones Act, 46 U.S.C.A. 688, as contended by the Petitioner.

The District Court awarded Petitioner $80,000.00 but reduced this amount by 50% for Petitioner's contributory negligence in not discovering and correcting the unseaworthy condition.

## Initial Decision of the District Court

The Trial Judge found that even though large tubs had been placed under the flanges of the discharge lines still there were drippings on the deck which had been covered with sawdust, a condition which existed for at least 2½ hours during Petitioner's watch prior to his injury. The Petitioner, as the supervisor of the watch, said the Court, not only had the duty to detect the presence of the oil but also to have it removed. Since he did neither his contributory negligence was 50% responsible for his accident and resulting injuries.

## Initial Decision of the Court of Appeals

The Court of Appeals found that the District Court should have judged Petitioner's contributory negligence by the traditional yardstick of the reasonably prudent man under the circumstances. The case was remanded for determination of whether the Petitioner was contributorily negligent and if so, to what degree, using the aforementioned standard.

*Appendix B*

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

**Decision of the District Court on Remand .**

The District Court in its opinion reviewed the evidence once again and, summarily stated, made the following consistent findings:

1. That the Petitioner admitted making a periodic inspection of the deck during the 2½ hours period prior to his accident and in particular the areas where the discharge was taking place and the accident occurred.

2. That at the time the Petitioner fell, he "was in a hurry" and there were indications in the record that he saw the oil and sawdust prior to his "slip."

3. That Petitioner admitted that if the tubs under the flanges became filled with oil, he would order them to be emptied by the seamen and if any oil was spilled, the seamen were directed to clean up the spillage and/or sawdust. This was a part Petitioner's duties as the supervisor of the watch.

4. That the accident occurred in an open and well lighted area under Petitioner's supervision.

The Court concluded that a reasonably prudent man would have discovered the condition to which Petitioner admitted and his failure to do so was 50% responsible for his accident.

## Second Decision of the Court of Appeals

The Court of Appeals in affirming the District Court found that the Trial Judge had followed their instructions and had applied the correct standard. In so doing the Court said:

> "After remand plaintiff moved for summary judgment and a redetermination of the damages on the trial record. Obedient to our instructions, the judge reviewed the record, and applied the standard we instructed him to apply. In a memorandum opinion he reaffirmed his previous estimate of the extent to which plaintiff's own negligence had contributed to the injury, and he reaffirmed his former award of damages. Plaintiff appealed. We affirm. Oil had been dripping for several hours from the coupling where the shore discharge lines and spill tubs had been placed under the leaking coupling to catch the drip. The entire area was well lighted. From midnight until 2:30 A.M. plaintiff had been responsible for the supervision of the work being done in this area, including the emptying of the spill tubs from time to time. The slippery condition caused by the oil that had dripped onto the deck from the coupling or the tubs should have been apparent to a reasonably prudent man in the plaintiff's position." (Petition, App. A, P. 16, 17)

## ARGUMENT

**1. The record and opinions below do not present the questions posed by petitioner.**

The record and opinions below do not present the four questions posed by Petitioner.

The first two questions raise the issue of whether an action for unseaworthiness, ex contractu in nature, prohibits the application of tort concepts of contributory negligence and assumption of risk.

These questions were not raised, briefed or argued below. They should not be allowed to be presented at this time. Cf. *California* vs. *Taylor*, 353 U.S. 553, 556, n2.

The third and fourth questions inquire whether a ship's watch officer's failure to discover an unknown unseaworthy condition constitutes negligence on his part. If the answer is in the affirmative, then the issue is whether his award is subject to reduction by reason thereof.

The third question was favorably decided for Petitioner on the first appeal. The Petitioner contended that the district court judged the Petitioner's conduct on an improper standard. The district court had held that Petitioner was under a duty to inspect and discover the oil spill and keep the deck clean and his failure to do so was contributory negligence. The Court of Appeals disagreed and remanded the case with instructions to examine Petitioner's conduct.

"By the traditional negligence standard of

whether he exercised the care which a reasonably prudent man would have exercised under the circumstances." Petition, Appendix A, P. 16)

As to the fourth question the district court on remand made a factual finding as to the slippery condition of the deck and held that the Petitioner's conduct did not measure up to the standard of a reasonably prudent man in Petitioner's position in the circumstances. There was no fact finding that the slippery deck was a latent unseaworthy condition but on the contrary, that the slippery deck was patent and that the entire area was well lighted. Knowledge with respect to negligence not only includes actual knowledge but constructive knowledge. The finding is one of fact in all the circumstances. The Petitioner does not contend that the findings of the Court are clearly erroneous. *McAllister* vs. *United States*, 348 U.S. 19 (1954).

**2. An action for unseaworthiness does not arise ex contractu.**

Assuming that questions one and two are timely it is submitted that they are based upon a false premise in that a personal injury action for unseaworthiness is not ex contractu.

Petitioner misconceives the nature of an action for the breach of the warranty of seaworthiness. In *Seas Shipping Company Inc.* vs. *Sieracki*, 328 U.S. 85 (1946) the Court extensively investigated the source, nature and extent of the warranty of seaworthiness (P. 94-95):

"It is essentially a species of liability without

> fault, analogous to other well known instances of our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. *Mahnich* vs. *Southern S.S. Co.*, 321 U.S. 96, 88 L.ed 561, 64 S. Ct. 455, supra; *Atlantic Transport Co.* vs. *Imbrovek*, 234 U.S. 52, 58 L ed 1208, 34 S. Ct. 733, 51 LRA(NS) 1157; *Carlisle Packing Co.* vs. *Sandanger*, 259 U.S. 255, 66 L. ed 927, 42 S. Ct. 475, supra. It is a form of absolute duty owing to all within the range of its humanitarian policy."

The foregoing language was quoted with approval in *Mitchell* vs. *Trawler Racer Inc.*, 362 U.S. 539, 549 (1963). In *Reed* vs. *Yaka*, 373 U.S. 448 (1963) this Court stated (P. 451):

> "In *Seas Shipping Co.* vs. *Sieracki*, 328 U.S. 85, 90 L ed 1099, 66 S. Ct. 872 (1946), we held that a shipowner's warranty of seaworthiness extended to a longshoreman injured while loading the ship, even though the longshoreman was employed by an independent contractor. In doing so, we noted particularly the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of seaworthiness, which we held not to depend upon any kind of contract. 328 U.S. at 93-95."

**3. It is well established in admiralty that contributory negligence is simply the doctrine of comparative negligence and that assumption of risk must be applied in harmony with it.**

In the Courts below the issue of assumption of risk was not raised by the Petitioner. The only concern was the standard of care by which Petitioner's conduct should be judged. The Appellate Court held that Petitioner's conduct should be judged by the standard of a "reasonable man." Conduct falling short of that of a reasonable man was deemed by the Court to be contributory negligence upon a factual finding and in mitigation of rather than a bar to Petitioner's claim.

Historically under the General Maritime Law, before the Jones Act, 46 U.S.C.A. 688, assumption of risk and contributory negligence were not a complete defense to an action for unseaworthiness. Contributory negligence was a partial defense, a ground for mitigation of damages. *The Arizona* vs. *Anelich*, 298 U.S. 110, 122 (1936); *Beadle* vs. *Spencer*, 298 U.S. 124, 131 (1936).

In *Socony-Vacuum Oil Co.* vs. *Smith*, 305 U.S. 424, 431 (1939) the Court stated:

> "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence,

however gross, is not a bar to recovery but only mitigates damages."

* * *

"We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman who makes use of a defective appliance knowing that a safe one is available. The power of the trial judge to guide and instruct the jury and his control over excessive verdicts afford as adequate a protection to owners as in any other case where the negligence of the seaman, whatever its degree, has contributed to an actionable injury."

Petitioner contends that a ship's officer is not negligent if he fails to correct an unseaworthy condition unknown to him. Petitioner misconceives the holdings of the Courts below. There are two facets to contributory negligence with respect to knowledge, actual and constructive. It was found, as a matter of fact and conclusion of law based thereon, that the Petitioner knew or should have known of the oily condition of the deck and that his conduct was not that of a reasonable prudent man.

**4. The rule of comparative negligence is a partial defense unlimited by the status of the claimant, his relationship to the party sued or the nature of the action.**

The comparative negligence rule has been applied in maritime personal injury cases against seamen, longshoremen, carpenters and shoreside workers regardless of contract and regardless of whether or not the claim against the vessel was based on negligence or unseaworthiness.

*Pope & Talbot, Inc.* vs. *Hawn*, 346 U.S. 406 (1953).

*The Steamer Max Morris* vs. *Curry*, 137 U.S. 1.

*Wood* vs. *U.S.*, 125 F. Supp. 42, 53 (S.D.N.Y. 1954).

*Efstratios Karanikolas* vs. *Navegacion Maritime Pan.*, 157 F. Supp. 602, 605 (S.D.N.Y. 1958).

*Jacob* vs. *New York*, 315 U.S. 752, 755.

*Bentley* vs. *Albatross S.S. Co.*, 203 F. 270 (3 C.A. 1953).

*Ahlgren* vs. *Red Star Towing & Transp. Co. Inc.*, 214 F. 2d 618 (2 C.A. 1954).

*John A. Roebling's Sons Co. of New York* vs. *Erickson*, 261 F. 986 (2 C.C.A. 1916).

Unseaworthiness and Jones Act, 46 U.S.C.A. 688, negligence remedies are cumulative. They arise out of the same injury and must be joined in a single proceeding. *McAllister* vs. *Magnolia Petroleum Co.*, 357 U.S. 221 (1958). A judgment for unseaworthiness is

a complete bar to a subsequent action for the same injuries under the Jones Act. *Baltimore Steamship Company* vs. *Phillips*, 274 U.S. 316 (1927). Shoreside workers unseaworthy and negligence remedies are cumulative. It would be incongruous and violate harmony and uniformity in the maritime law if the rule of comparative negligence were denied as a partial defense in an action for unseaworthiness and allowed as a statutory partial defense under the Jones Act and an action for maritime negligence. In effect the Jones Act would be repealed. There are comparatively few conceivable situations where an action under the Jones Act would be brought instead of an action for unseaworthiness, but if such suits were continued to be joined a charge to a jury of contributory negligence solely in a Jones Act suit would be meaningless and could not effect the end result of full damages without diminution in the unseaworthy suit. A seaman or shore worker could recover full damages for the rankest kind of gross negligence and a reckless disregard for his own safety. Cf. *Socony-Vacuum Oil Co.* vs. *Smith*, 305 U.S. 424, 431 (1939).

There is no necessity for the Court to go so far as to abolish the comparative negligence rule in unseaworthy actions. The effect would be to virtually make the shipowner an insurer without the seamen or maritime shore workers absorbing any portion of their injuries whatever their fault may be.

**5. The decisions below are clearly correct.**

The sole question before the Court on the first appeal was whether or not the District Court applied the proper standard in judging the Petitioner's conduct. The Trial Court judged Petitioner's conduct on the basis of a duty imposed upon Petitioner to inspect and discover the oil spill. The district Judge equated the breach of that duty to contributory negligence. Upon remand the district Judge was instructed to re-examine the Petitioner's conduct on the standard of a "reasonable prudent man." He applied the required standard and again found Petitioner guilty of contributory negligence. The Judgment was affirmed on Appeal.

The district Judge made a finding of fact and on the factual determination applied the reasonable man rule. Petitioner does not contend that the finding of fact was clearly erroneous or that the Court failed to apply the proper standard of care to Petitioner. The contention is that the facts as found did not amount to contributory negligence as a matter of law in that the unseaworthiness was unknown to Petitioner. It is further argued the partial defense of contributory negligence is not available in ex contractu causes of action, an action for the breach of warranty of seaworthiness.

The argument of Petitioner on the second appeal was that the trial Court did not follow the instructions of the Circuit Court but rendered the same opinion a second time in almost the same language. The

Appellate Court disagreed with Petitioner's contentions for reasons heretofore set forth.

The factual and legal determination of the Petitioner's conduct judged by the standard of a reasonably prudent man is binding upon the Petitioner upon his application for the Writ of Certiorari.

**6. There is no conflict in the decisions.**

None of the cases cited by the Petitioner present a conflict in the decisions between circuits or within any one circuit.

In *Dixon* vs. *United States*, 219 F. 2d 10 (2 C.A. 1955) there was a factual determination by the trial judge that the Plaintiff was not guilty of contributory negligence. That finding was not disturbed on appeal. The case was remanded from the Circuit Court to the Trial Court for further proceedings with respect to the determination of the proximate cause of Plaintiff's accident.

In *Becker* vs. *Waterman S.S. Corporation*, 179 F. 2d 713 (2 C.A. 1950) the jury determined that the Plaintiff was not guilty of contributory negligence. He had not seen a blob of oil on which he slipped. The Court stated (P. 713):

> "There is no substantial dispute as to the facts which the jury could have found from the evidence."

The shipowner contended in the *Becker* case the Plaintiff, the chief officer, could not recover because

he was under a duty to correct a dangerous condition of which he had knowledge and sustained his injuries by reason of the very condition he was employed to correct. The Court rejected the argument and stated that (P. 715):

> "If the Plaintiff was also negligent in failing to see the blob of oil on which he slipped, his own negligence may reduce the amount of his recovery but is not a bar to his action."

There was also a finding that the assistant engineer's negligence contributed to the accident.

In *Stokes* vs. *United States*, 144 F. 2d 82 (2 C.A. 1944) the Court held (P. 87):

> "Accordingly, we think that the findings of fact and inferences on which the trial judge based his conclusion that libellant was guilty of negligence was clearly erroneous."

In *Hildebrand* vs. *United States*, 226 F. 2d 215 (2 C.A. 1955) the Court in affirming the District Court stated (P. 216):

> "The findings which respondent attacks are not clearly erroneous."

The District Court 134 F. Supp. 514 (SDNY 1954) found that the mate was not guilty of contributory negligence in using a ladder with two rungs missing where the mate had knowledge of that condition. The Court stated (P. 518):

> "I do not believe that it can be assumed that because two rungs are missing from a ladder, that it is negligent to use the balance of the ladder.

particularly when the ladder had been in use and continued to be in use up to the time of the accident. I therefore conclude that the injuries received by the libelant were not contributed to by any negligence on the part of libelant."

In *Socony-Vacuum Oil Co.* vs. *Smith*, 305 U.S. 424, the Court held that assumption of risk was not a defense to a seaman's action, but it should be construed in harmony with the partial defense of contributory negligence, a doctrine of comparative negligence.

Thus, in all of the foregoing cases the Courts in the factual context of each case applied the standard of a reasonable prudent man and made a factual determination as to whether the seaman's conduct was equal or fell short of such standard. In no case did the Court hold that assumption of risk was recognized in admiralty as a complete defense to the seaman's action.

Respondent does not disagree with the remaining cases cited by Petitioner insofar as they recognize and apply the principle that knowledge will not be imputed as a matter of law to one who fails to look for danger, which, under the prevailing circumstances and conditions he had no reason to apprehend or anticipate. This principle of law is encompassed in the standard of conduct of a reasonable prudent man and his knowledge, actual or constructive, of prevailing circumstances and conditions he had reason to apprehend or anticipate.

The cases cited by Petitioner with reference to the doctrine of maintenance and cure and the contractual obligation of a stevedore, an independent contractor,

to a shipowner are not in point. They involve considerations and policy unrelated to the obligation of a shipowner to a seaman under the doctrine of seaworthiness and the duty of the seaman to exercise reasonable care for his own safety.

Whatever may be the principle and the effect of cases, decided under the Fifth Amendment of the U. S. Constitution, they have no application in this case. Petitioner has made no showing that the decision of the Court in this case has denied Petitioner equal protection before the law or by reason of any conflicting decisions.

## CONCLUSION

**For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.**

Respectfully submitted,

JOHN R. SHENEMAN
*Attorney for Respondent*
52 Broadway
New York 4, New York

EDWIN K. REID
*Of Counsel*

## APPENDIX A

### Opinion of Bonsal, *D. J.*, on Remand (June 17, 1963)

APPEARANCES:

JACOB RASSNER, Esq.
of New York City, New York
Attorney for Plaintiff

ZOCK, PETRIE, SHENEMAN & REID, Esqs.
of New York City, New York
Attorneys for Defendants

EDWIN K. REID, Esq.
Of Counsel

BONSAL, D. J.

MEMORANDUM

Plaintiff sued under the general maritime law for personal injuries received while aboard the defendant's vessel, the S.S. GENIE. Judgment was rendered for the plaintiff by this Court, sitting without a jury, in which the Court found the plaintiff 50 per cent contributorily negligent and awarded him damages of $40,000. 204 F. Supp. 293 (S. D. N. Y. April 13, 1962). Plaintiff's right to recover was affirmed by the Court of Appeals for the Second Circuit, but the Court held that an improper standard had been applied in determining plaintiff's contributory negligence (Docket No. 27843, May 7, 1963). Therefore, the case was "remanded to the District Court for a

new determination, made in light of the proper standard, of whether plaintiff was contributorily negligent" (slipsheet, at 1994).

Plaintiff has now moved for summary judgment and a redetermination of the damages on the basis of the opinion of the Court of Appeals and the record of the trial. Oral argument has been had, and the Court has carefully reviewed the trial record in the light of the decision of the Court of Appeals.

The accident in question occurred in November 1957. At that time the plaintiff had been a seaman for approximately 32 years and a second mate aboard the tanker GENIE for two years. This Court found that the unseaworthy condition which caused the accident had been present for some time.

> "However, if we accept the plaintiff's testimony that no oil was spilled and sawdust spread over it during his watch, it is clear that at 2:30 A.M. when the plaintiff slipped and fell, the unseaworthy condition was not one of a 'mere momentary' nature. If there was oil on the deck covered with sawdust at 2:30 A.M., and no oil was spilled or sawdust spread from midnight on, it is reasonable to believe that the condition existed prior to midnight." 204 F. Supp. at 295.

It was conceded at the trial that the area in which the accident occurred was properly lighted.

Plaintiff stated that as mate in charge of the watch he would periodically inspect the ship, particularly the areas in which oil was being taken on or dis-

charged. He testified that if the tubs placed under the connecting lines should become full or if there were sawdust on the deck, he would instruct the seamen under him to empty the tubs or clean up the sawdust. Plaintiff testified that when he came on watch at midnight the ship was still discharging oil and that during his watch when the injury occurred he was supervising the discharge.

At the time of his accident plaintiff was passing under the discharge lines which were four to five feet above the deck. The accident occurred in the center of the deck approximately fifteen feet from the rail. Plaintiff testified he was in a hurry when he fell about one to two feet away from the tub which was under the connection between the ship's discharge line and the shore line.

There was an indication at the trial that the plaintiff saw the oil and sawdust just prior to the time he slipped upon it. However, it is clear that, even if the plaintiff did not have actual notice of the unseaworthy condition, he certainly had constructive notice. Here was a condition which had existed for several hours in a well-lighted open place within the area of inspection of plaintiff's watch. No one in plaintiff's position exercising "the care which a reasonably prudent man would have exercised under the circumstances" (at 1994, slipsheet) could have failed to be warned of the unseaworthy condition.

Therefore, applying the mandate of the Court of Appeals to judge the plaintiff's conduct "by the traditional negligence standard" stated above, the Court

finds that the plaintiff was contributorily negligent and that this contributory negligence was 50 per cent responsible for the accident in which the plaintiff received his injuries.

Judgment will be entered for the plaintiff in the amount of $40,000.

So Ordered.

Dated: New York, N. Y.
June 17, 1963.

/s/ DUDLEY B. BONSAL
U.S.D.J.

Office-Supreme Court, U.S.
FILED
APR 15 1964
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 832

STEFANOS KTISTAKIS,
*Petitioner,*

*vs.*

UNITED CROSS NAVIGATION CORP. and CARRAS (U.S.A.) LTD.,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITIONER'S REPLY BRIEF

JACOB RASSNER,
*Counsel for Petitioner,*
15 Park Row,
New York 38, N. Y.

Adams Press Corp., 82 Beekman Street, N. Y.—Beekman 3-1050-51 110

# Supreme Court of the United States

OCTOBER TERM, 1963

**No. 832**

STEFANOS KTISTAKIS,

*Petitioner,*

*v.*

UNITED CROSS NAVIGATION CORP.,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITIONER'S REPLY BRIEF

The applicability of the defenses of assumption of risk and contributory negligence in a breach of warranty of seaworthiness claim is one of the substantial questions meriting this court's review and clarification.

Respondent's brief in opposition to the petition indulges in poetic license without any justification in fact.

Contrary to respondent's statement in its brief, the fact is that petitioner alleged error in the court below in respect to the trial court's treatment of the question of contributory negligence and assumption of risk on the facts in the case.

This court has stated in unequivocal terms that our courts are not concerned with form—only with substance. *Holmes v. Pope et Talbot*, 346 U. S. 406.

In the cases cited in respondent's brief in opposition to the petition, the parties had not raised the questions raised in the petition herein regarding the availability of the tort defense of contributory negligence to bar the claim or to mitigate damages.

This question has been decided in relation to indemnity in stevedoring contracts (*Ryan Atlantic* v. *Ryan*, 349 U. S. 901), but never as to indemnity to seamen for breach of warranty.

This question is of basic and substantial importance in the entire field of maritime jurisprudence.

The said cases, therefore, are neither authority nor precedent for or against the ruling now sought by petitioner.

Petitioner doesn't question or dispute that, till now, contributory negligence has been applied to diminish damages.

However, a custom long continued is not immune from attack.

Petitioner now attacks the practice as applying a tort standard to a contract cause of action, breach of warranty.

This has been held inappropriate by this court in *The Atlantic* v. *Ryan*, 349 U. S. 901, and, more recently, in *Italia* v. *Oregon* (decided March 9, 1964), —— U. S. ——.

In *Italia*, *supra*, this court said:

> "The shipowner is liable for unseaworthiness, regardless of negligence, whenever the ship or its gear is not reasonably fit for the purpose for which it was intended . . ." (Footnote 3)

and, at p. 5 of slipsheet:

> "In the area of contractual indemnity, an application of the theories of active or passive negligence as well as primary or secondary negligence is inappropriate." *Weyerhaeuser, supra*, at 569."

and, at p. 9 of the slipsheet:

> "They also serve to render a tort standard of negligence inapplicable to the stevedore's liability under its warranty of workmanlike service."

**Wherefore petitioner respectfully prays that the petition herein be granted.**

Respectfully submitted.

JACOB RASSNER,
*Counsel for Petitioner.*